No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,
Appellant,

v.

FIRST CITY NATIONAL BANK OF HOUSTON,
SOUTHERN NATIONAL BANK OF HOUSTON, AND
WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLEES, FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON

VINSON, ELKINS, WEEMS & SEARLS
First City National Bank Building
Houston, Texas 77002

ANDREWS, KURTH, CAMPBELL & JONES
25th Floor Humble Building
Houston, Texas
Of Counsel

DAVID T. SEARLS
HARRY M. REASONER
JOHN L. MURCHISON, JR.
Attorneys for First City National Bank of Houston
First City National Bank Building
Houston, Texas 77002

LEON M. PAYNE
WILLIAM R. LUMMIS
THOMAS L. HEALEY
Attorneys for Southern National Bank of Houston
25th Floor Humble Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

SUBJECT INDEX

INDEX OF AUTHORITIES

Cases

Statutes

Congressional Material

Miscellaneous

No. 914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,

Appellant,

v.

FIRST CITY NATIONAL BANK OF HOUSTON,
SOUTHERN NATIONAL BANK OF HOUSTON, AND
WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF APPELLEES, FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON

OPINION BELOW

The judgment of the district court (App. pp. 4a-5a) dismissing the plaintiff's complaint was entered without formal opinion. The district judge's oral remarks made immediately before the announcement of his decision are reprinted in 1967 Trade Cas. ¶ 71,970 (App. pp. 2a-3a)

QUESTION PRESENTED

The first question which the Department of Justice asserts is presented before this Court by appeals Nos. 914 and 972 is not appropriate for No. 914 which was dismissed on the pleadings before any question of burden of proof was reached. The question presented is properly stated:

Whether the Bank Merger Act of 1966 requires the Department of Justice, in an antitrust suit seeking to enjoin a bank merger, to allege facts in its complaint establishing that the merger will have anticompetitive effects which are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

STATEMENT

This appeal presents the first challenge of a merger approved under the standards of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), to reach this Court. All parties apparently agree that the Bank Merger Act of 1966 significantly amends in a number of ways the Bank Merger Act of 1960, 74 Stat. 129. Under the new Act consummation of mergers is delayed for 29 days after approval by the responsible banking agency. The Department of Justice (Department) is thereby given additional time to review the proposed merger and, if it deems necessary, to file suit. 12 U.S.C. § 1828(c)(6).

A statute of limitations is imposed. If the Department does not file suit prior to the earliest time at which the merger can be consummated, it is barred from filing suit. An automatic statutory stay of the effectiveness of agency approval is provided, thus giving the Department a preliminary injunction against the merger with the mere filing of its complaint. Perhaps the most significant amendment, however, is the requirement that, except for cases brought under section 2 of the Sherman Act, 15 U.S.C. § 2, a court reviewing the Comptroller of the Currency's (Comptroller) decision approving a merger application is required to

apply standards identical with those applied by the Comptroller in evaluating the merger.[1] This is, of course, directly contrary to the construction of the Bank Merger Act of 1960 where it was proper for a banking agency to approve a merger under the test set forth by that Act and for the Department subsequently to attack the merger in court under the differing standards of the antitrust laws. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

The mandatory test to be applied is set forth in 12 U.S.C. § 1828(c)(5):

> The responsible agency shall not approve —
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

---

[1] In section 2 cases the standards of the Bank Merger Act of 1966 are inapplicable. The courts continue to look to section 2 of the Sherman Act. See 12 U.S.C. § 1828(c)(7)(B).

The test under the 1966 Act corresponds with that under the Bank Merger Act of 1960 in that the ultimate issue which the appropriate banking agency must reach is: whether the proposed merger is in the public interest.[2] The only salient difference between the processes for resolution of the ultimate issue under the respective acts is that greater weight must be given to anticompetitive effects under the 1966 Act. The ultimate issue as to whether the proposed merger is in the public interest remains the same.

Pursuant to the requirements of the Bank Merger Act of 1966, First City National Bank of Houston (First City) and Southern National Bank of Houston (Southern) filed an application with the Comptroller of the Currency for approval to merge (Defendants' Exhibit 1). As required by the Comptroller, the application contained detailed financial data on the merging banks and an extensive economic brief, including an exhaustive treatment by the banks

---

[2] Except for cases where a monopoly charge is filed under paragraph 5(A) of the Bank Merger Act of 1966. In such cases the public interest is not considered.

The 1960 Act, 74 Stat. 129, 12 U.S.C. § 1828(c), provided in pertinent part:

> "In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest."

See also H.R. Rep. No. 1416, 86th Cong., 2d Sess. 10-12 (1960).

of what they considered to be the effects in meeting the convenience and needs of the community to be served. Complete copies of this application were furnished to the Department by the defendant banks. Thereafter, defendant banks filed an extensive supplemental memorandum with the Department (Defendants' Exhibit 2), which was also furnished to the Comptroller of the Currency and made a part of the record before him.

The Comptroller received the statutorily required advisory opinions from the banking agencies and the Department. The Regional Administrator of National Banks for the Eleventh District recommended approval of the merger on the basis that his examination showed little competitive impact and great benefits to the community to be served. The Department advised that the proposed merger would have a serious adverse effect upon competition in the Houston area (Defendants' Exhibit 3). The Board of Governors of the Federal Reserve System advised that the overall competitive effect of the proposal would be adverse (Defendants' Exhibit 4). The Board of Directors of the Federal Deposit Insurance Corporation advised that it did not appear that the consummation of the merger would have a substantial anticompetitive effect (Defendants' Exhibit 5).

After consideration of the extensive evidence adduced before him together with various agency reports the Comptroller of the Currency on September 20, 1966, approved the application to merge concluding:

> [T]he probable effect of the proposed merger upon competition is clearly outweighed in the public interest by the probable beneficial effects of the merger upon the convenience and needs of the community to be served by First City National Bank. (Defendants' Exhibit 6).

The Comptroller's decision of September 20, 1966, was supplemented by a formal opinion on November 10, 1966 (Defendants' Exhibit 7), and by a supplemental opinion enlarging upon the analysis in the November opinion on December 1, 1966 (Defendants' Exhibit 8). Thus the agencies involved split evenly on the anticompetitive effects of the merger: the Federal Reserve Board and the Department finding them adverse; the F.D.I.C. and the Comptroller finding them not adverse.

On October 18, 1966, the Department filed suit alleging, without reference to the Bank Merger Act of 1966, that the proposed merger of Southern and First City would violate section 7 of the Clayton Act. The Comptroller of the Currency was given leave to intervene by order of the district court. The Comptroller thereupon filed an answer to the complaint of the Department of Justice and moved to dismiss on the ground that the complaint of the Department failed to state a claim under the Bank Merger Act of 1966. Thereafter, First City and Southern moved for dissolution of the automatic statutory stay which arose pursuant to paragraph (7)(A) of the Bank Merger Act of 1966 upon commencement of the action by the Department of Justice.

After introduction of extensive evidence by the banks in support of their motion and argument by all parties on their respective motions, the district court concluded that, in order to allege properly a violation of the Bank Merger Act of 1966, the Department is required to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. The district judge stated that he was reluctant to dismiss on the pleadings and allowed the Department ten days to amend its com-

plaint, indicating that he would be willing to extend more time if necessary (App. p. 3a). Although well aware that the judge was dismissing the case on the narrow point of failure to allege facts sufficient to base a claim under the Bank Merger Act of 1966, the Department refused to amend, electing to stand on its position that it could bring suit under section 7 of the Clayton Act. It thereby brought this narrow pleading question up on appeal. It deliberately accepted the risks of standing on its pleadings even though six district courts had held that the Department could not stand on section 7 of the Clayton Act but must bring its case under the controlling statute, the Bank Merger Act of 1966.[3]

The Department has altered its position from that taken before the trial court. It now concedes that the Bank Merger Act of 1966 has created a new standard of legality which is controlling in bank merger cases. See, *e.g.*, Department's Brief pp. 11, 31-32. However, this case must be resolved on the basis of the complaint filed in the trial court which relied nakedly on section 7 of the Clayton Act without reference to the Bank Merger Act of 1966 and the test set forth therein. (See App. B, Department's Brief). It cannot amend that complaint before this Court for purposes of argument.

---

[3] The instant case and: United States v. Mercantile Trust Co., 5 Trade Reg. Rep. (1966 Trade Cas.) ¶ ..... (E.D. Mo. Dec. 19, 1966) (Dismissed on Pleadings); United States v. Third Nat'l Bank of Nashville, 5 Trade Reg. Rep. (1966 Trade Cas.) ¶71,934 (M.D. Tenn. Nov. 22, 1966) (Trial on Merits); United States v. Provident Nat'l Bank, 15 Trade Reg. Rep. (1966 Trade Cas.) ¶71,931 (E.D. Pa. Oct. 13, 1966) (Holding in denying motion to dismiss); United States v. Crocker-Anglo Nat'l Bank, 5 Trade Reg. Rep. (1966 Trade Cas.) ¶71,898 (N.D. Cal. Oct. 6, 1966) (Decision remanding cause to Comptroller); United States v. First Nat'l Bank of Hawaii, Civ. No. 2540 (D. Hawaii 1966) (Oral Opinion of October 31, 1966, Transcript at 91-94) (Holding on denial of motion to dismiss.)

SUMMARY OF THE ARGUMENT

1. The trial court dismissed the Department's complaint on the pleadings on the ground that the Department had failed to allege sufficient facts to state a claim under the controlling statute, the Bank Merger Act of 1966. The trial court expressly limited its holding to the burden of pleading and the Department concurred with the trial court that this was the extent of its holding. Since the burden of proof and burden of pleading are separable, the trial court did not necessarily decide the burden of proof in sustaining the motion to dismiss.

2. The burden of pleading both elements of the statutory test set forth in the Bank Merger Act of 1966, is clearly upon the Department. It must allege facts establishing that the merger will have anticompetitive effects which are not clearly outweighed in the public interest. This is essential to raise the ultimate issue: whether the merger is in the public interest. The language of the statute provides explicitly that the public convenience and needs are to be considered in "every case". Thus, consideration of the public interest cannot be treated as a special exception to be raised only by defensive pleading.

3. The provision of the Bank Merger Act of 1966 covering the public interest is so incorporated with the statutory definition of the offense that the elements of the offense cannot be accurately and clearly described when the provision is omitted. It is clear that consideration of the convenience and needs is an integral element in the test set forth by the Bank Merger Act of 1966 and is not legally an exception. The rules of pleading require that a plaintiff relying on the statutory test must allege sufficient facts to show that the defendant is not within the provision. The Department cites no authority contrary to this proposi-

tion. Its cases deal with provisions which both structurally and from the purpose of the statutes and instruments involved are obviously special exceptions which need not be negatived by a plaintiff. They provide no asistance in determining whether consideration of the convenience and needs is a special exception or is an integral element of the statutory test — the initial and crucial determination which this Court must make.

4. The legislative history of the Bank Merger Act of 1966 clearly demonstrates that the paramount purpose of the Act was to establish a single set of standards for consideration of future mergers by the banking agencies, the Department and the courts. Only by requiring the Department to plead both elements of the statutory test can the congressional purpose of creating a single standard for the agencies, the Department and the courts be achieved. Otherwise, it would be possible for an agency to approve a merger under the standards of the Bank Merger Act of 1966 and for the Department to attack it under differing standards, as was the case under the Bank Merger Act of 1960. This pleading question is particularly vital since the mere institution of suit by the Department creates an automatic statutory stay of the merger. Congress cannot have intended that the Department become entitled to an automatic injunction without even having the burden of alleging all of the facts necessary to demonstrate a violation of the controlling statute.

5. In the event that this case should be remanded because of a determination that it was improperly dismissed on the pleadings, the statutory stay should not revive. The uncontroverted evidence adduced before the trial court in support of the motion to dissolve the stay provides an adequate ground for affirming the dissolution of the statutory stay.

ARGUMENT

I. The District Court Decided Only the Pleading Question of What Facts the Department Must Allege to Attack Properly a Merger Approved Under the Bank Merger Act of 1966.

The only action of the trial court before this Court for review in No. 914 is its judgment on the pleadings granting the Comptroller's Motion to Dismiss. The Comptroller's motion was predicated on the premise that the complaint failed "to state facts sufficient to support a cause of action." The judge's explanatory remarks make it clear that, while he considered other courts to have held that the burden of proof on determination of the public interest is on the Department, he based his dismissal solely on the fact that the Department had failed to plead sufficient facts to invoke the test as set forth in the Bank Merger Act of 1966 (App. pp. 1a-2a).

During the hearing, the trial judge, obviously concerned with the position of the Department which was forcing him to dismiss on a narrow pleading question, three times interrogated the Department's trial attorney to ascertain if they were in agreement that only a pleading issue was before the court, once specifically disavowing concern with the burden of proof. (App. p. 1a). The Department's trial attorney three times concurred that only a pleading issue was involved. (App. pp. 1a-2a).

The Department now takes the position that the district judge not only decided what pleadings were requisite, but also decided where the burden of proof lay. The transcript of the proceedings below demonstrates that the district judge did not intend to make any such decision and that indeed the Department of Justice at the trial stage con-

curred with his understanding that he was deciding only where the burden of pleading lay.

The only possible justification for the Department's position before this Court would be the argument that the dismissal of its complaint for the failure to plead that the anticompetitive effects of the proposed merger are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served is necessarily a decision that the Department has the burden of proof on this issue. This proposition is clearly incorrect. While the burden of pleading and the burden of proof usually correspond, they do not necessarily do so. *Palmer* v. *Hoffman*, 318 U.S. 109, 117 (1943); *New York Cent. & H. R. R. Co.* v. *United States*, 165 Fed. 833, 839 (1st Cir. 1908); CLARK, CODE PLEADING § 96 at 610 (2d ed. 1947); Annot., 130 A.L.R. 440, 480 (1941). Thus, a court dismissing a complaint for insufficient pleading does not thereby decide the burden of proof. The question remained open. For example, the Department could have simply plead in the alternative. Fed.R.Civ.P. 8(e). It could have argued, relying on the same authorities which it urges before this Court, that despite its burden of pleading, the burden of proof fell upon the defendants. 9 WIGMORE, EVIDENCE § 2485 at 273 (3rd ed. 1940).

This appeal is markedly distinguished from No. 972, *United States* v. *Provident National Bank*. Although motions to dismiss on the pleadings were made in *Provident*, they were denied (5 Trade Reg. Rep. ¶ 71,934.) The Department's case was dismissed on motion for final judgment, not because of pleading defects, but because the Department advised the trial court that it would refuse to meet the burden of proof placed on it and would refuse to

honor the scope of review which the trial court had concluded was appropriate (5 Trade Reg. Rep. ¶ 71,895).[4] In the present case (No. 914) the trial court did not reach the "review de novo" question, but merely held that the pleading was insufficient because it did not invoke the full test of the Bank Merger Act of 1966.[5]

II. The Burden Of Pleading All Elements Of The Statutory Test Set Forth By The Bank Merger Act Of 1966 Is On The Department Of Justice.

Undisputedly a complainant seeking to rely on a statute must allege facts sufficient to state a claim upon which relief can be granted. Fed.R.Civ.P.8(a); Fed.R.Civ.P.12. The Department has failed to state such a claim. The Department has alleged only that the proposed merger would have

---

[4] The trial court in No. 972 (*Provident* case) characterized the Department's position as follows:

> "The court, therefore, finds that since Justice has definitely refused to try its case under BMA-66, the banks should not be subjected to the expense and inconvenience of a trial when Justice refuses to prove other than admitted facts to establish its case. Its position has been taken deliberately and directly in opposition to the ruling of the court of October 13, 1966 and is consistent with the position of the Government on a Nationwide basis, even though the Courts have been unanimous in refusing to accept its contention. (citations omitted)" 5 Trade Reg. Rep. (1966 Trade Cas.) ¶71,985 at 83,484.

[5] The Department argues at great length as to what the proper scope of review should be under the Act because of "the contention" that Congress intended to limit the courts to a review function under the Act. (Department's Brief p. 23.) The appropriate scope of review was not determined by the trial court in No. 914. Determination of the scope of review is not necessary to determine the propriety of the trial court's dismissal on the pleadings. Accordingly, we have made no contention with regard to scope of review and do not join issue with the Department.

anticompetitive consequences in violation of section 7 of the Clayton Act[6] and has made no allegations that the anticompetitive consequences are not clearly outweighed by the benefits in the public interest. If the determination of whether the anticompetitive effects are clearly outweighed in the public interest is an integral element of the statutory test set forth by the Bank Merger Act of 1966, the Department's pleadings are fatally defective. It has failed to allege facts sufficient to state a claim under the Bank Merger Act of 1966.

Clearly then, the critical decision to be made by this Court is whether the determination that the anticompetitive effects are clearly outweighed in the public interest is an integral element of the test which must be considered in every case or is a special exception merely raising the possibility of an affirmative defense by the defendants. The Department's brief is of little assistance in making this decision. As we shall subsequently demonstrate, the authorities on which it relies are concerned with the hornbook principles that a special exception to the prohibitions of a statute need not be negatived by the pleadings of one who relies on the statute and the burden of proof lies on the party who seeks to benefit from the special exception. They are of no assistance in making the initial and critical determination whether the requirement in question is an integral element of the statutory test or is a special exception.

We submit that the plain meaning, the structure, and the legislative history of the Bank Merger Act of 1966 all demonstrate that the determination whether the anticompetitive effects are clearly outweighed in the public interest is an integral element of the test set forth by the Act. Since

---

[6] It should be noted, that contrary to the Department's assertion (Department's Brief, p. 49), the Bank Merger Act standards do not incorporate section 7 verbatim. The language "in any line of commerce" was deliberately and, purposefully omitted. 112 Cong. Rec. 2541 (Daily ed.).

this determination is an integral element of the definition of an offense and not a special exception, the Department has the burden of pleading that the anticompetitive effects of a challenged merger are not clearly outweighed in the public interest.

The statutory standard defining a violation of the Act is contained in one general clause with the requirement of consideration of the public interest contained as an intrinsic part of that clause. The Act provides in paragraph (5)(B) that a responsible agency shall not approve:

> any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Paragraph (7)(B) explicitly requires the courts to apply identical standards in reviewing an agency approval except in monopoly cases brought under section 2 of the Sherman Act. 12 U.S.C. § 1828(c)(7)(B). The weighing of the benefits to the convenience and needs of the community is an integral element of the statute. It is no special exception to be considered only when raised as a defensive issue by the defendants — the statute explicitly requires: "In *every* case, the responsible agency shall take into consideration . . . the convenience and needs of the community to be served." (Em-

phasis supplied.) Thus to apply standards identical to those of the responsible agency, as the statute requires, the courts must in *every* case take into consideration the convenience and needs of the community to be served.

The function of the banking agencies and the courts resembles that of the Interstate Commerce Commission which in evaluating railroad mergers while giving weight to anticompetitive facts must reach in every case "the ultimate question whether the merger would be consistent with public interest despite the foreseeable injury to competition." *Seaboard Air Line R.R.* v. *United States,* 382 U.S. 154, 156 (1965).[7]

The Department's analysis of the decisional process required of a court under the Bank Merger Act of 1966 recognizes that the determination whether the anticompetitive effects are clearly outweighed in the public interest is an integral element of the statutory test and must be made by the court in every case — not merely where it is raised as an affirmative defense. It described the "steps that must be followed in applying the standard of the Act to a particular case" as follows:

> "(1) The first determination the court must make is whether the challenged merger's 'effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade * * *.'
>
> * * *

---

[7] Congressman Moorehead, one of the principal proponents of the Bank Merger Act cited *Seaboard* and *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944) as appropriate precedents for the function of the responsible banking agencies contemplated under the Bank Merger Act. 112 Cong. Rec. (Daily ed.) 2340. See *United States* v. *Crocker-Anglo Nat'l Bank,* 5 Trade Reg. Rep. (1966 Trade Cas.) ¶ 71,898 at 83,156 (N.D. Cal. Oct. 6, 1966).

"(2) If such an effect is found, the court must next consider 'the probable effect of the transaction in meeting the convenience and needs of the community to be served.'

• • •

"(3) Once the court has determined whether the merger will in fact produce any benefits within the scope of the convenience and needs defense, it must next consider whether the challenged merger is necessary to achieve them.

• • •

"(4) Only after appraising the claimed benefits of the merger will the court be prepared to perform the ultimate act of judgment required by the Bank Merger Act — that of weighing the competitive harms of the challenged merger against considerations of community convenience and need." (Department's Brief pp. 42-45. See also Department's Brief p. 39).

As the Department described it, competitive effect is merely "one-half of the equation" (Department's Brief p. 48).[8] Surely the Department cannot state a claim for relief under the Bank Merger Act of 1966 without alleging facts sufficient to satisfy the other one-half of the equation.

It has long been settled law that where a statute contains a provision in the grammatical form of an exception within a section defining an offense, which is so incorporated with the definition of the offense that the elements of the offense cannot be accurately and clearly described if the provision is omitted, the rules of pleading require that a plaintiff relying on the statute must allege sufficient facts to show that the defendant is not within the provision. The provision

[8] The trial judge's analysis agrees with the Solicitor General's analysis, though he conceptualized the Act's requirements as "steps" rather than parts of an equation:

"I think that the petition fails to state a cause of action in that it alleges only the first step and not the second step which is necessary for the plaintiff to support" (App. p. 3a).

is simply not an exception in a real or legal sense. *United States* v. *Cook*, 84 U.S. 168, 173 (1872); *Maxwell Land Grant Co.* v. *Dawson*, 151 U.S. 586, 604 (1894); *Seese* v. *Bethlehem Steel Co.*, 74 F. Supp. 412, 416 (D. Md. 1947), *aff'd*, 168 F. 2d 58 (4th Cir. 1948); *Grand Trunk Ry. Co.* v. *United States*, 229 Fed. 116, 119 (7th Cir. 1916); *United States* v. *Oregon Short Line R. Co.*, 160 Fed. 526, 528 (D. Idaho 1908).[9]

Applying this test to the Bank Merger Act of 1966, it is clear that consideration of the convenience and needs is so incorporated with the language defining the offense that the standards for what constitutes a violation of the Act cannot be adequately defined without reference to this factor. The public convenience and needs are to be considered in the words of the statute "in every case". This consideration is not a narrow exception applicable to some small class of cases where it is raised by defensive pleading. It is an integral element of the decisional process which must be utilized by both the appropriate banking agency and by the courts if the mandate of the statute for determination of the public interest is to be honored. It does not constitute an exception to the general definition of the offense prohibited by the Act — it is an inseparable part of that definition.

The Department cites no authority contrary to the proposition that the test set forth in *United States* v. *Cook* and the other authorities cited above, should control in determining whether consideration of the convenience and needs is an integral element of the statutory test set forth in the Bank Merger Act of 1966 or is a special exception which need not be plead. Its authorities are concerned with pro-

---

[9] See generally the cases cited in Annot., *Burden of allegation and proof in civil causes as regards exception in statute*, 130 A.L.R. 440 (1941); Annot., 3 A.L.R. 2d 1097, 1143-44 (1949).

visions which are clearly, both from the purposes and structure of the instrument or statute involved, special exceptions which need not be plead by the party relying on the statute or instrument. They are of no aid in making the determination which this Court must make: whether consideration of the convenience and needs is an integral element of the statutory test or is a special exception.

Javierre v. *Central Altagracia, Inc.*, 217 U.S. 502 (1910), is a contract case concerning a condition subsequent embodied in a typewritten proviso added to the fourteenth clause of a printed sugar cane milling contract, 3 Puerto Rico Fed. Rep. 256, 261 (D. Mayaguez 1908) — not a grammatical "exception" embodied within the general clause of a statute defining an offense. *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), involves an exception contained in a proviso in a subsequent substantive provision of the Robinson-Patman Act, which explicitly provides that the burden of proof is on one who seeks to benefit from the exception. 334 U.S. at 45. *Nicoli* v. *Briggs*, 83 F. 2d 375 (10th Cir. 1936), involved a deportation hearing conducted under a warrant of arrest which recited that the defendant was "not within any exception" of the relevant statute. The relevant act, 8 U.S.C. § 156a, provided for the deportation of any alien convicted of violating the narcotics laws, with a narrow special exception carved out for addicts who were not dealers in or peddlers of narcotic drugs. Far from conflicting with *United States* v. *Cook, supra,* all three cases rely on it as authority. *Nicoli* explicitly demonstrates that *Javierre* and *McKelvey* v. *United States*, 260 U.S. 353 (1922) (upon which the Department also seeks to rely) are not contrary to *Cook*:

> "One sentence in United States v. Cook, 17 Wall. 168, 21 L. Ed. 538, is cited contra. That opinion, read as a whole, does not appear to be at variance with the later case of McKelvey v. United States, supra. It holds, as we read it, that if it is impossible to frame the statu-

> tory charge without negativing the exception, then it should be negatived; but where, as here, the statute states a clear, definite, and general offense, and then excepts certain classes or acts from its scope, the exception need not be negatived." 83 F. 2d at 379.

United States v. *King & Howe, Inc.*, 78 F. 2d 693 (2d Cir. 1935), which also relies on *United States* v. *Cook* as authority, simply follows the general rule that where an exception is not a part of the general clause defining an offense, but is contained in a subsequent provision of the statute, the exception need not be plead by the party relying on the general clause of the statute. Annot., 130 A.L.R. 440, 443 (1941). However, the Second Circuit clearly implies in *King & Howe* that if the statute contained the exception within the general clause, as did the applicable regulation, this would have been evidence that the United States should be required to negate the exception in its pleadings. 78 F. 2d at 696. *United States* v. *Fleischman*, 339 U.S. 349 (1950), involves "the familiar doctrine in criminal cases that 'it is not incumbent on the prosecution to adduce positive evidence to support a negative averment . . .' It concerns only the burden of proof, not the burden of pleading which is at issue here.

The legislative history of the Bank Merger Act of 1966 is clouded by conflicts in the strongly partisan positions taken by the bill's proponents and opponents as to its proper interpretation. On one point, however, there is no controversy. The bill was designed to eliminate the conflict caused by the variant standards applied in evaluating bank mergers by the Department of Justice and the various banking administrative agencies. As the House Committee on Banking and Currency stated in its report:

> "The bill would establish a single set of standards for the consideration of future mergers by the banking

> supervisory agencies, the Department of Justice and the courts under the antitrust laws — standards stricter than those in the Bank Merger Act [of 1960], but which include both the effect of the merger on competition and the convenience and needs of the community to be served. . . ." H.R. Rep. No. 1221, 89th Cong., 2d Sess. 1 (1966).

Congressman Patman, Chairman of the House Committee on Banking and Currency, upon whose understanding of the Act the Department has heavily relied, summarized this purpose succinctly:[10]

> "The major purpose of this bill is to provide a single standard for the approval and adjudication of bank mergers prior to their consummation . . . Under the Bank Merger Act of 1960 the bank supervisory agencies approved bank mergers on the basis of one standard and the Justice Department was free to attack these same mergers under the Sherman and Clayton Antitrust Acts. The Supreme Court of the United States in the Philadelphia National Bank case in June of 1963 held that the Bank Merger Act of 1960 did not preclude the application of the antitrust laws to bank mergers. The banking agencies and the courts continued to act under distinct statutory authority. A majority of your committee felt that the law should provide a single standard to be applied by the agencies and the courts alike.
>
> "This is exactly what this bill does. The single standard that the bill establishes is found in paragraph 5(b) . . ." 112 Cong. Rec. (Daily ed.) 2333.

---

[10] Many other congressmen can be cited on this point. See, *e.g.*, 112 Cong. Rec. (Daily ed.) 2333 (Congressman Smith, Va.); 112 Cong. Rec. (Daily ed.) 2336 (Congressman Multer); 112 Cong. Rec. (Daily ed.) 2337 (Congressman Brock); 112 Cong. Rec. (Daily ed.) 2339 (Congressman Ashley); 112 Cong. Rec. (Daily ed.) 2343 (Congressman Stanton); 112 Cong. Rec. (Daily ed.) 2355 (Congressman Grabowski). The sense of the Senate was the same. 112 Cong. Rec. (Daily ed.) 2538 (Senator Robertson); 112 Cong. Rec. (Daily ed.) 2545 (Senator Hart).

In view of the plain meaning of the statute, which is clearly reinforced by the legislative history, banks contemplating merger now should be able to do so with the assurance that their application will not be evaluated by one set of standards by the banking agencies and then attacked on the basis of another set of standards by the Department of Justice.

This paramount statutory purpose of requiring the banking agencies, the Department of Justice, and the courts to apply a single standard in evaluating bank mergers requires that the burden of pleading the anticompetitive effects of the proposed transaction are not clearly outweighed in the public interest be placed upon the Department. The Department's position — that it is entitled to evaluate a merger and file a lawsuit under section 7 of the Clayton Act without being required to plead that the anticompetitive effects of the transaction are not clearly outweighed in the public interest — would thwart the congressional purpose. Mergers which were manifestly legal under the Bank Merger Act of 1966 could be approved by administrative agencies on the ground that the anticompetitive effects of the transaction were clearly outweighed in the public interest and subsequently attacked by the Department of Justice on the basis of another standard.

This pleading question is peculiarly vital in an area where the mere institution of a suit, with the resultant automatic statutory stay, can in itself frustrate a proposed merger. See, *e.g.*, *United States* v. *First Nat'l Bank of State College*, 5 Trade Reg. Rep. 52,622 Cas. No. 1900 (D. Pa. 1966). (Banks withdrew application for approval to merge after complaint was filed); Note, 79 Harv. L. Rev. 391, 393-94 (1965). In antitrust litigation under the Sherman and Clayton Acts, the government must swear to all of the necessary "specific facts" in order to obtain an ex parte re-

straining order. Rule 65(b) Fed. R. Civ. P. Congress could not have intended that a plaintiff become entitled to an automatic injunction without even having the burden of alleging all the facts necessary to demonstrate a violation of the controlling statute.[11] The burden of pleading that the benefits of the transaction in the public interest do not clearly outweigh the anticompetitive effects gives the Department the duty of making the allegation in good faith, whether it has the burden of proof or not. Fed. R. Civ. P. 11; CLARK, CODE PLEADING § 41 at 253 (2d ed. 1947). This, of course, assures that the new statutory test would be honored by the Department in its administration of its duties under the statute as Congress intended.

III. The Statutory Stay Should Not Be Revived In The Event Of Remand Since The Evidence Adduced By Appellees Below Was Sufficient To Require Dissolution Of The Stay.

Appellee banks produced extensive evidence in the trial court in support of their motion for dissolution of the statutory stay. This evidence demonstrated both that the anticompetitive effects of the merger would not be significant-

---

[11] Under the Department's construction of the Act, it would be entitled to bring suits without even forming an opinion as to whether the benefits of the transaction in meeting the convenience and needs of the community to be served clearly outweigh its anticompetitive effects. Apparently, this is what it did in *Provident*. Many months after filing suit, the Department's only response to the Philadelphia banks' detailed outline of their claims on convenience and needs was the statement that it "is not in a position to inform this Court whether Plaintiff believes conclusions reached [in the Banks' pretrial brief] are correct or not." (Department's reply brief in *Provident*, ¶ 21). It took this position even though the trial court's Pre-trial Order No. 1 provided that any issues, contentions or claims not set forth in the pre-trial briefs are to be deemed "abandoned, uncontroverted, or withdrawn."

ly anticompetitive,[12] and that any anticompetitive effects would be clearly outweighed in the public interest by the probable benefits to the convenience and needs of the community from the transaction.[13] The Department's only response to these hundreds of pages of documentary evidence produced below was an affidavit showing alleged concentration figures. All of the banks' evidence on the benefits to the convenience and needs of the community and the bulk of the evidence produced on the competitive effects was unchallenged.

Even were the government to prevail in its position that the motion to dismiss was improperly granted, the trial court's grant of the motion to dissolve the statutory stay should nevertheless be sustained since appellees' evidence of the convenience and needs of the community was not challenged by appellant and provides a sufficient basis for dissolution of the statutory stay.

CONCLUSION

By adamantly standing on its pleadings, the Department has presented in No. 914 an appeal based solely on a narrow question of pleading. The plain meaning of the Act, the basic rules of pleading, and effectuation of the statutory purpose, as evidenced by the legislative history, require that the burden of pleading both elements of the statutory test be placed upon the Department. The questions of burden of proof and scope of review under the Bank Merger Act of 1966 are independent of the burden of pleading. Thus, even if the questions of burden of proof and scope of review were reached and were resolved in the Department's favor,

---

[12] See especially, Defendants' Exhibit 2, Supplemental Memorandum to the Antitrust Division of the Department of Justice.

[13] See Defendants' Exhibit 1, Application to the Comptroller of the Currency for Approval to Merge.

they do not affect the propriety of the trial court's dismissal on the pleadings in No. 914.

The Department deliberately refused to amend its pleadings in this cause even though six district courts (one a three-judge court) had indicated that its pleading theories were erroneous. By bringing this case to this Court on the pleadings it has already delayed the trial of this cause by some four months. If this case is remanded, reinstatement of the statutory stay at this point would make it commercially infeasible for defendant banks to litigate the cause on the merits. We submit that if the trial court's dismissal on the pleadings is found to be correct by this Court there should be no remand. The Department deliberately chose to stand on its complaint after the trial court gave it an opportunity to amend. It should bear the consequences of that deliberate decision. The action of the trial court should be affirmed and this litigation terminated.

Respectfully submitted,

David T. Searls
Harry M. Reasoner
John L. Murchison, Jr.
Attorneys for First City National Bank of Houston
First City National Bank Building
Houston, Texas 77002

Leon M. Payne
William R. Lummis
Thomas L. Healey
Attorneys for Southern National Bank of Houston
25th Floor Humble Building
Houston, Texas 77002

Vinson, Elkins, Weems & Searls
First City National Bank Building
Houston, Texas 77002

Andrews, Kurth, Campbell & Jones
25th Floor Humble Building
Houston, Texas
Of Counsel

APPENDIX

Excerpts From Transcript

"THE COURT: Well, the burden, I am not too much [concerned] about the burden of proof but as to what is actually necessary for you to allege, and that is what we are concerned about here.

"Isn't this a motion to dismiss beeause you don't state a cause of action?

"MR. TOOHEY: We don't state sufficient, in the words of the motion, facts —

"THE COURT: — upon which relief could be granted. Right?

"MR. TOOHEY: To support an action, a cause of action under the Bank Merger Act of 1966 or Section 2 of the Sherman Act. I think that is the language of the motion." (Last Hour of Proceedings, pp. 5-6)

* * *

"THE COURT: I recognize full well that this is very important and serious litigation. I go *(sic)* [have] no more desire than Judge Clary had to dispose of this on a matter of pleading. Normally, of course, we don't.

"Certainly as he points out the defendant knew full well what the Government was driving at when you filed this suit irrespective of the verbiage you used in your petition. By the same token isn't it true that you knew full well what you were saying and doing? You didn't omit this second step accidentially or inadvertantly —

"MR. TOOHEY: No." (Last Hour of Proceedings p. 12)

* * *

"THE COURT: You say that Section 7 applies. I suppose it can't be denied that it applies in some particulars, yes.

"What do you mean by that? What we are interested in here today is not whether Section 7 applies, but whether you have alleged a cause of action in your petition. Is that not true?

"MR. TOOHEY: Yes.

"THE COURT: What are the elements of your cause of action? You say to allege that the effect of the merger would be anticompetitive. Right?

"MR. TOOHEY: Yes.

"THE COURT: The defendants and the intervenor, as I understand it, such authority as there is, seems to say that it is necessary for you to allege, "A", that the effect would be anticompetitive and that ["B"] that it is not outweighed by the convenience and need. It seems to me as simple as that.

"I am not really interested in a definition as to what is or what is not an antitrust statute or whether you say categoricallly that Section 7 does or does not apply or other sections of the Clayton Act apply.

"I think it is just a question as to whether or not you have alleged a cause of action, or if you want to amend and undertake to do so, if you haven't already done it.

"Is that oversimplifying it, Mr. Toohey?

"MR. TOOHEY: Not at all, Your Honor." (Last Hour of Proceedings pp. 21-23)

• • •

"THE COURT: Anything else anybody wants to add?

(All answered in negative.).

"THE COURT: I am of the view in the light of these few authorities which we have at this time that the act of '66 made some rather substantial changes in the law. I understand the cases to hold the burden to be on the plaintiff to allege and prove an anticompetitive result of the merger, and further that that is not outweighed by the convenience and needs aspect of the matter.

"I think the Department of Justice has continued for reasons of its own to adopt a contrary interpretation which, of course, may or may not be accurate, these cases not having yet reached the appellate level, but I consider them as authoritative, at least at this time.

"I think that the petition fails to state a cause of action in that it alleges only the first step and not the second step which is necessary for the plaintiff to support.

"I have no desire to dispose of a case of this kind on a question of pleading. I think that was the view that influenced the other Judges that had the same matter before them when they spoke of notice pleading. That, however, isn't a case — well, this present case is one where all parties have acted with their eyes open. Both the plaintiff and the defendants have known precisely what they were doing. If they do not allege a case in their present petition, then Justice has done that because it desired to do so.

"I will sustain the motion to dismiss for failing to state a cause of action. I will give the government if it wishes an opportunity to amend and to allege a cause of action as I understand is required by the authorities to date.

"Let us say within ten days?"

United States District Court for the Southern District of Texas, Houston Division

---

Civil Action No. 66-H-695. Filed December 7, 1966

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON, DEFENDANTS, AND JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, INTERVENOR.

Judgment

The above cause came on to be heard on the 2nd day of December, 1966, on the Motion For Dissolution Of Statutory Stay of defendants, First City National Bank of Houston and Southern National Bank of Houston, and the Motion to Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency, and came the plaintiff, defendants and intervenor by and through their respective attorneys of record and announced ready for the hearing on said Motions; thereupon, the Court, after hearing the pleadings, evidence and argument of counsel, is of the opinion and so finds that the Motion To Dismiss of the Intervenor should be granted with leave of the plaintiff to amend its complaint within ten (10) days and that as a result thereof, Defendants' Motion For Dissolution Of Statutory Stay should be granted.

It is, therefore, ORDERED that the Motion to Dismiss of Intervenor, James J. Saxon, Comptroller of the Currency be granted and this cause will be dismissed unless plaintiff shall amend his complaint within ten (10) days from the effective date hereof.

It is further ORDERED that the Motion for Dissolution of Statutory Stay of First City National Bank of Houston and Southern National Bank of Houston will be granted, effective on dismissal of the action.

It is further ORDERED that this judgment is and shall become effective at 12:00 o'clock Noon on December 9, 1966.

ENTERED on this 7th day of December, 1966.

(S) BEN C. CONNALLY,

United States District Judge.